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Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1989

TOM FOLEY,

Petitioner,

vs.

WCCO T.V., Inc., a corporation,
Steven Eckert, John Lindsay,

Respondents.

Petition for Writ of Certiorari
to the Supreme Court
of Minnesota

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QUESTIONS PRESENTED

I

Whether the Minnesota Courts failed properly to apply First Amendment principles when those courts erred in finding an absence of a jury issued on actual malice in this public figure's claim for defamation damages against news media.

II

Whether the Minnesota Courts failed properly to apply First Amendment principles when those courts struck broadcast remarks charging plaintiff with bribery, conflict of interest, and obstruction of justice.

THE PARTIES

Petitioner: Tom Foley, represented by Patrick J. Foley, 608 Second Avenue South, Minneapolis, MN 55402.

Respondents: WCCO T.V., Steve Eckert, and John Lindsay, represented by Paula Osborn, 45 S. 7th Street, Minneapolis, MN 55402 and Paul Hannah, 1122 Pioneer Building, St. Paul, MN 55101.

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Respondents.

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Minnesota Supreme Court entered an Order on February 9, 1990 denying Petitioner's Petition for Review of the decision of the Minnesota Court of Appeals. (Apx. 1.)

The Petition for Review of the decision of the Court of Appeals posited the issues of whether the Court of Appeals erred in interpreting the United States Constitution, First Amendment, when it held that statements charging Petitioner with unethical and criminal conduct were non-defamatory and that there was an inadequate record demonstrating a jury issue on actual malice by the Respondents. (Apx. 2).

The Minnesota Court of Appeals on December 26, 1989 entered an Order holding that certain statements were true and not defamatory and that there was not evidence of actual malic. (Apx. 3).

The trial court's order is Apx. 4. The order for judgment was entered on April 5, 1989. (Apx. 5).

JURISDICTION OF THIS COURT

This Court has jurisdiction to review the orders described herein by certiorari pursuant to 28 U.S.C. Section 1257(a) because petitioner has been deprived of a jury trial by the unwarranted interpretations and has been deprived of a jury trial by the unwarranted interpretations of this Court's decisions requiring independent judicial review of evidence of actual malice as required by *New York Times v. Sullivan* and thereby involved an important interpretation of the United States Constitution, First Amendment.

This Court has never defined what is required by the appellate courts in giving independent appellate review of the evidence on actual malice. This is an appropriate vehicle for the Court to articulate precisely what must be considered in determining whether a public figure such as Petitioner must establish as proof of actual malice in a defamation claim against news media.

Jurisdiction is lent by this Court's rule providing for review by *certiorari* when a State court has decided an important question of federal law which has not been, but should be, settled by this Court; and here the State Court has decided a federal question in a way in conflict with applicable decisions of this Court. Rule 17.1(c), Supreme Court Rules.

This Court has jurisdiction to review the Order of the Minnesota Supreme Court denying review of the Minnesota Court of Appeals decision; and this Court has jurisdiction therefor to review the Minnesota Court of Appeals decision. The state court decisions were beyond the constitutional authority of the Minnesota Courts, were entered without deference to this Court's rulings and interpretations on important First Amendment — defamation issues; and those decisions fail to comply with the opinions of this Court on defamation issues of public figures.

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment 1, provides as follows:

> Congress shall make no law respecting an establishment or religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Plaintiff Tom Foley has been elected county attorney of Ramsey County, State of Minnesota, since 1978. He did not participate in any of the investigation of the death of Kathleen Greening, who died on July 21, 1982. That death was attributed to undetermined causes by the Ramsey County Medical Officer in 1982 and 1983. The Medical Examiner, Dr. Michael McGee, informed Petitioner's office in October, 1985 that he would review the case.

Respondents inititated an investigation into Petitioner's proposed conduct relating to the investigation and the change of designation of the cause of death by Dr. McGee.

The Roseville Police Department in February 1986, informed one of the Petitioner's assistants that there may be a request for a search warrant in connection with the investigation and the bank records of the decedent's husband, a lawyer in a prominent St. Paul firm. The assistant stated that there was no probable cause for the issuance of such a warrant. Petitioner was not informed of the search warrant or his assistant's decision.

Respondents interviewed Dr. McGee and recorded the interview by videotape. Petitioner held a news conference on the following day, February 27, 1986; and in the presence of the Respondents Petitioner specifically denied any involvement in the investigation or any suggestion to the Ramsey County Medical Examiner, Dr. McGee, that there should be a delay in the death certificate change.

The clear evidence of malice by Respondents is demonstrated by its business records showing that three days before the broadcasts, Respondents' records warn that the investigation may be a miscalculation or that "a local prosecutor has blocked a murder investigation in which one of his own campaign contributors is a prime suspect." Yet, none of the Minnesota Courts discussed this critical evidence that would undoubtedly eliminate the defense of the First Amendment freedoms and create a jury issue.

Respondents' broadcasts reported that the Medical Examiner's Office stated that they were told not to change the death certificate from accident to murder by Petitioner; that the investigation indicated that a suspect may be one of Petitioner's campaign contributors; that Dr. McGee said that the change had been delayed at the request of Petitioner's office, while showing a photograph of Petitioner; and in the context of referring to Petitioner, Dr. McGee was quoted as having stated "and so we have tried to cooperate with them in that regard and have done essentially what they have asked us." The reference to the "them" and "they" in the last quotation in context referred to Petitioner although Dr. McGee's statement in context was not meant by him to include Petitioner.

Respondents broadcast on February 27, 1986 and repeated this for ten months.

A. *The decision of the trial court.*

The trial court on March 16, 1988, (Apx. 4,) held with regard to the various broadcasts as follows:

1. Respondents broadcast repeatedly along the lines that "he (Petitioner) knew Greening was a potential suspect, yet took money from him at least two times thereafter. There is something there." Also, broadcasts implied that Petitioner had telephoned the Minnesota Attorney General's Office and thereafter a state investigator was "taken off the case." This was followed by, "*** if investigators knew of the possible conflict of interest in 1982, whey it took three years for Foley (Petitioner) to remove himself from the case.

The trial court held that charging Petitioner with a conflict of interest was not a viable claim because:

> Implicit in this is the inference that plaintiff was personally aware of the letter, or that there was a potential conflict of interest. In point of fact, there is is no showing that the plaintiff was personally aware of either the letter or the potential conflict of interest. On the other hand, the statements made are factually correst. *** The investigating policy agency did identify a prime suspect in the murder. This

> suspect was monetary contributor to the re-election campaign of the plaintiff. Although it was not designated as such, it is clear that there was a conflict of interest. (Apx. 4, p. 13.)

The trial court regarding the conflict of interest issue exonerated the Respondents because of the "fair comment doctrine." (Apx. 4, p. 14.) The doctrine was described by the trial court as the qualified privilege on behalf of the media, obviously a First Amendment issue. (Apx. 4, p. 8.)

2. The trial court ruled that the broadcasts that Petitioner blocked the issuance of a search warrant to review the bank records of the prime suspect "appears to be derogatory" to Petitioner. (Apx. 4, p. 14.) The trial court said that "the meaning conveyed is that (Petitioner) was seeking to obstruct justice. If this were the meaning sought to be conveyed, or if indeed it was the meaning conveyed, then clearly it is capable of defamatory meaning." (Apx. 4, p. 14.) The court, however, struck this as non-defamatory because of its "context." It was based upon a subsequent report explaining that this meant Ramsey County authorities rather than Petitioner.

3. The trial court held that in context the broadcasts about Petitioner communicating with the medical examiner, Dr. McGee, about not changing the death certificate were capable of defamatory meaning. (Apx. 4, p. 18).

4. The trial court, (Apx. 5,) on January 20, 1989 granted summary judgment for the Respondents on the basis that Petitioner had not established a triable issue on actual malice as required by *New York Times v. Sullivan*, 376 U.S. 254 (1964). The trial court did not reiterate Petitioner's proof of actual malice. (Apx. 5, p. 10). The court held that the Respondents reported that Petitioner had acted to keep Dr. McGee from changing the death certificate but questioned whether the jury could conclude that the defendents from clear and convincing evidence knew that the reports were false or entertained serious doubts.

Without summarizing Petitioner's evidence, the trial court erroneously held that there was no actual malice as

required by *New York Times v. Sullivan, supra;* and held that there was an absence of evidence to demonstrate a failure to ask the proper questions. (Apx. 5, p. 10).

B. *Facts unreported and not broadcast by Respondents.*

Respondent Eckert admitted that he never learned of any indication that Petitioner objected to the change in the death certificate. Respondent Eckert's notes demonstrate that he had planned to ask Dr. McGee about whether Petitioner had caused any delay in the change in the death certificate. His notes indicate that he desired to learn when the M.E. office met with the County Attorney about the cause of death and was that three times up to and in December, 1985. And why they did not change the status to murder after having talked with Petitioner. Respondents Eckert and Lindsay never learned any indication that Petitioner had communicated with Dr. McGee about changing or not changing the death certificate. No records of Respondent WCCO T.V. established that Petitioner ever discussed the Greening death with Dr. McGee at any time.

Respondent Eckert stated that he had no explanation for why he did not broadcast that he did not ask the Medical Examiner, Dr. McGee, whether the Petitioner had any role in delaying the reclassification. He had no explanation for whey he did not follow up on his earlier records which he described as his "battle plan" to learn whether Petitioner had involved himself "by telling medical examiners he did not want the case to come back as murder ***." That same Respondent did not broadcast that if asked, Dr. McGee would have stated that Petitioner never was involved in the changing of the death certificate or the delay of that change. The Respondent did not broadcast that the corporate records of January 12, 1985 included a list of questions to ask Dr. McGee and one was "Why didn't they change the status of case to murder after talking to Foley?"

The evidence clearly demonstrated at the trial court and appellate level that Petitioner never discussed the matter with Dr. McGee and never participated in any attempt to delay the change of the death certificate or any of the earlier facets of the investigation. Dr. McGee testified that if asked

by Respondent Eckert, he would have stated that Petitioner never discouraged the initial investigation, that no one from Petitioner's office discouraged the original undetermined classification of death; that no one from Petitioner's office used any influence to discourage the revision. There is absolutely no evidence that Petitioner took any action that was a conflict of interest, and the Respondents admitted that in depositions presented to the trial court and the Court of Appeals.

C. *The Decisions of the Court of Appeals.*

The Minnesota Court of Appeals on December 26, 1989 affirmed the summary judgment for the Respondents on the issue of absence of evidence to make a triable issue on actual malice. The court cited *Harte-Hanks Communications, Inc. v. Connaughton,* U.S. , 109 S.Ct. 2678 (1989) and *New York Times v. Sullivan,* 376 U.S. 254 (1964). The Court of Appeals stated that the trial court had considerable information before it and then gave a general listing of documents rather than the contents thereof or any of the deposition testimony. (Apx. 3, p. 11-12). The court acknowledged that Petitioner was not personally involved in the death certificate discussions but attributed a subordinate's actions to Petitioner. (Apx. 3, p. 12.) The Court purported to give an "independent review of the record" and affirmed the judgment. (Apx. 3, p. 13.)

The Minnesota Court of Appeals opinion involved a dissent by Judge Randal, (Apx. 3, p. D-1 FF) and he states that the matter is not appropriate for disposition for judgment on the pleadings or summary judgment. He states that

> *** the record discloses disputed fact issues concerning who, if anyone, from appellant's office put pressure on Dr. McGee not to change a death certificate from undetermined to homicide. Did appellant do it? Did appellant authorize someone else to do it? (Apx. 3, D-1.)

Judge Randal states that,

> Appellant makes out a reasonable case that at every juncture, the broadcasts put him in as bad a light as possible. (Apx. 3, p. D-2.)

Judge Randal stated that,

> I do not find the broad shield of the First Amendment impervious to appellant's attack at this pre-trial stage. ***
>
> *** I cannot escape the feeling that the trial court, in effect, conducted a 'mini-trial' on the issues, weighed evidence and credibility and came to the conclusion that (Petitioner) probably would not prevail at trial. (Apx. 3, p. D-7.)

The Minnesota Court of Appeals majority stated that,

> The affidavits reveal that Foley never personally asked McGee to change the death certificate; however, the affidavits and press release show that Foley asked Assistant County Attorney Balck to review the case file and that Balck advised McGee against changing the death certificate because it would not change the fact that there was insufficient evidence to charge any suspect. (Apx. 3, p. 12.)

D. *The Facts Ingnored by the Minnesota Courts.*

Athough the Court of Appeals stated that it had given an "independent review of the record," (Apx. 3, p. 13), the majority did not incorporate into its opinion the objective evidence that petitioner presented by affidavit and deposition to establish that the Respondents had planned to determine the facts by interviewing Dr. McGee, interviewed Dr. McGee, and withheld asking any of the pertinent questions which would have resolved all of the issues. Furthermore, the Respondents were present at the news conference during which Petitioner specifically denied causing any delay in the change of the death certificate.

This Court should articulate a statement requiring appellate courts giving independent review to summarize the specific facts adduced in support of actual malice before the Court can conscientiously state that the evidence is

inadequate.

Petitioner through the entire litigation from the filing of the Complaint predicated his claim for defamation damages upon his being a public figure with the requirement of demonstrating not only the falsity, which here is not really contested, and actual malice in broadcasting the falsity.

Judge Randal in his dissent stated that as to the proof of actual malice, "I suggest at this stage enough of a case exists to present to a jury." (Apx. 3, p. D-6). He added, "I do not find the broad shield of the First Amendment impervious to appellant's attack at this pre-trial stage." He concluded that resolution of the factual disputes would authorize a jury to find actual malice. (Apx. 3, D-7.)

Although the broadcasts repeatedly reported that appellant had a conflict of interest and tied in that broadcast with the receipt of a letter from the Roseville Police Department from October, 1982 and suggesting that conflict of interest, it is clear from the evidence that Petitioner never knew of the letter and had no involvement in the investigation before November, 1985. Yet, the courts despite the broadcasts that "authorities" were aware of the possible conflict of interest three years earlier, refused to hold that these were capable of a defamatory meaning although the broadcast included "Foley should have pulled out from the beginning. He knew Greening was a potential suspect, yet took money from him at least two times after that. There is something there." That was demonstrably false in the evidence presented to the trial and appellate courts.

The Minnesota courts stated that subsequent broadcasts explained the process and therefore eliminated the defamatory content, a novel concept without legal precendent.

The evidence shows that on the Dr. McGee transaction, the Respondents acted with actual malice with reckless disregard of the truth and falsity. Respondent Eckert admitted that he never asked Dr. McGee about Petitioner in any role during his extensive videotaped interview before the broadcast. He admitted that the term "they" referred not to Petitioner but to the Roseville Police Department and

somebody in the Ramsey County Attorney's office. Respondent had no explanation for why he did not broadcast that Dr. McGee told him that no one said no to his changing the death certificate. Respondent Eckert admitted that he had planned to ask Dr. McGee specifically whether Petitioner's office has encouraged an initial undetermined cause of death and that he was to learn when the RCME office met with the County Attorney about the cause of death and whether that was up to three times, and why in December, 1985 the RCME did not change the status to murder after talking with the Petitioner. He did not broadcast that the RCME, Dr. McGee, had stated that he would not change the death certificate because of family wishes.

Respondent Lindsay testified that so far as he knew, Petitioner never did anything to help or hinder the investigation.

Petitioner sought review of this matter with the Minnesota Supreme Court and presented the legal issues as to whether the Court of Appeals erred in interpreting the United States Constitution First Amendment principles as non-defamatory in broadcasting false statements implying that plaintiff was guilty of unethical and criminal conduct and whether the Court of Appeals erred on the same principles in holding that there was an inadequate record demonstrating actual malice by the Respondents. (Apx. 2.) The Minnesota Supreme Court denied review on February 9, 1990. (Apx. 1).

REASONS FOR GRANTING THE WRIT

Minnesota Courts failed to make the independent appellate review required by this Court in *New York Times v. Sullivan* cases. Question No. 1.

1. *This Petition presents a proper vehicle for this Court to instruct all appellate courts as to the requisites for conducting an independent appellate review.*

This Court has never stated precisely what is required in a judicial opinion when there is a public figure suing for

damages from defamation broadcast by media defendents. This Court should hold on the basis of the evidence in this case that the Minnesota trial court and Court of Appeals failed to demonstrate in its opinion that there was adequate appellate independent review of the evidence. The Court should hold further that the evidence in this case makes a triable issue of actual malice.

2. *This Court's benchmark decision in New York Times Company v. Sullivan, 376 U.S. 254 (1964) was improperly applied by the Minnesota Courts which held that the statements that were defamatory had not been made with actual malice.*

This Court in *New York Times* made a detailed analysis of the evidence to determine whether the record could constitutionally support a judgment. *Ibid* at 284-285. The Minnesota courts ignored Petitioner's evidence.

The principal decision establishing the need for independent review is *Bose Corp. v. Consumer Union of U.S., Inc.* 466 U.S. 485 (1984), reg. den. 467 U.S. 1267, where this court reviewed the record to determine whether the evidence was of a "convincing clarity required to strip the utterance of First Amendment protection ***." 466 U.S. at 511. This court imposed the responsibility that

> *** Judges, expositors of the Constitution, must independently decide whether the evidence of the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.' *Ibid* at 511.

This matter was clarified by Justice White;s decision for the court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), in the holding that the evidence must be presented "*** through the prism of the substantive evidentiary burden." *Ibid.* at 254. That opinion requires that "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Ibid* at 255.

This Court should grant this Petition and clarify precisely what the appellate and trial court opinions must include to establish that the court made the independent review of the record as a basis for the conclusion that there was or was not adequate evidence to make a jury issue on actual malice with the substantive evidentiary standard of proof required by *Anderson v. Liberty Lobby, Inc., supra.*

3. *The First Amendment authorities warrant a trial in this case.*

This Court in *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29 (1971) considered a defamation claim and held that "the simple fact is that First Amendment questions of 'constitional fact compels this Court's *de novo* review." 403 U.S. at 54. The court cited two cases that were not defamation claims, vis. *Edwards v. South Carolina,* 372 U.S. 229 (1963) involving a breach of the peace conviction reversed because of the constitutional rights of speech, assembly, and petition for redress of grievances, and the court held that it is a duty to make an "independent examination of the whole record;" and *Blackburn v. State of Alabama,* 361 U.S. 218 (1960), involving a criminal conviction and a reversal of the conviction because of an unconstitutional, involuntary confession. 361 U.S. at 205. In a review of a conviction for possession in exhibiting an obscene film, this court held in *Jacob Ellis v. State of Ohio,* 378 U.S. 184, 190 (1964) that,

> Hence we reaffirm the principle that, in 'obscenity' cases as in all other involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved in constitutionally protected.

This Court has consistently mandated that constitutional issues and the facts revolving around them be independently reviewed by the judiciary. Neither the trial court nor the State Court of Appeals in this case did so with any deference to or mention of the rich record supporting triable issue of actual malice against the Respondents.

4. *This Court has the authority to reverse the state court decision.*

It is clear under *Fiske v. State of Kansas*, 274 U.S. 380, 385-386 that this court may review the findings of fact by a state court where a federal right has been msapplied as a result of a finding shown by the record to be without evidence to support is or where the conclusion of law on a federal right and a finding of fact are so intermingled as to make it necessary to analyze the facts to pass on the federal question.

The record in the present case demonstrates that the Minnesota Trial and appellate courts erred in applying this Court's constitutional principles by ignoring this Petitioner's record of facts.

5. *Appellate courts consistently reverse erroneous findings on actual malice.*

In the libel action that eventually was resolved in this Court's opinion in *Time, Inc. v. Pape*, 401 U.S. 279 (1971), the Seventh Circuit was deeply involved in reviewing the record. In *Pape v. Time, Inc.*, 318 F.2d 652 (7th Cir. 1963), the court reversed a dismissal of the Complaint alleging libel for mischaracterization of an official report on the ground that the jury could understand and read the article differently from what the court did. The second reversal, in *Pape, v. Time, Inc.*, 354 F.2d 558 (7th Cir. 1965) was rendered after this Court's decision in *New York Times Co. v. Sullivan*; and the Seventh Circuit determined that the trial court erred in granting a motion for summary judgment for the media. *Ibid.* at 560. In the third appeal, *Pape v. Time, Inc.*, 419 F.2d 980 (7th Cir. 1969), the trial court directed a verdict for the news media defendent; and this was reversed by the Court of Appeal opinion which held.

> Surely, a deliberate act of omission can show malice as well as an act of commission. Time omitted mention of the fact that when the article was written, the Pape-Monroe incident was reported in 'justice' as allegations in a complaint, not as proven fact. *Ibid.* at 982.

The searching independent judicial review is manifested by this Court's opinion in *Time, Inc. v. Pape,* 401 U.S. 279 (1971), which reversed the Seventh Circuit in the case just quoted, 419 F2d 980. This Court stated that the Court had frequently reviewed the evidence to determine whether the record would constitutionally support a judgment for a plaintiff. 401 U.S. at 284. this Court held that the record did not indicate a reckless disregard of the truth by the news medium. 401 U.S. at 293.

This searching of the record in *Pape* history demonstrates that the courts must give detailed analysis to the factual record. This would be consistent with the basic principle that on considering the motion for summary judgment, the Court must resolve all inferences in favor of the non-moving party and must perform the judicial role of determining not the facts of the case but whether a fact issue exists. The Minnesota courts in this case have given no consideration in their opions to the evidence that actually supports a jury finding, as suggested by Judge Randal in his dissent in the Court of Appeals opinion.

The courts must independently decide whether the evidence demonstrates malice by clear and convincing proof. *Bose Corp. v. Consumers U. of U.S, Inc.,* 466 U.S. 485, 512. The ruling on actual malice by summary judgment is not designed to denigrate the role of the jury. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986).

In *Harte-Hanks Comm. Inc. v. Connaughton,* U.S. , 109 S.Ct. at 2678 (1989), this Court exemplified the role of the courts in giving independent judicial review of the evidence on actual malice. However, this Court not only gave independent examination but also stated the relevant evidence that would have been considered favorable by the jury in rendering a verdict for or against the plaintiff. The Minnesota courts here, however, fail to state the Petitioner's abundant evidence on actual malice.

This Court should grant review and establish the basic rules for how the courts demonstrate that they have indeed made an independent review of the evidence on actual malice. A consideration of Petitioner's evidence would

warrant a reversal of the Minnesota courts decisions.

The Minnesota Courts erred in applying First Amendment principles in striking certain broadcast statements. **Question No. 2.**

The Minnesota Courts struck the Petitioner's allegations that charged among other things defamation by the Respondents in broadcasting that Petitioner knew that Greening "*** was potential suspect, yet took money from him at least two times after. There is something there." Also, "Foley [Petitioner] blocked the search warrant." Also that "*** if investigators knew of possible conflict of interest in 1982, why it took three years for [Petitioner] Foley to remove himself from the case."

The trial court held that statements of opinion by news media are absolutely privileged under the First Amendment. (Apx. 4, p. 5). That court held that public officials may be subjected to the criticisms by the "qualified privilege of fair comment" under the First Amendment. (Apx. 4, p.g 8). The trial court held that on the charge of the conflict of interest, although the evidence did not disclose the Petitioner was aware of the conflict of interest, the statements were not false. The court totally ignored the content of the allegations, for the court did not quote the statements and ignored the role of the jury in this First Amendment case.

The trial court continued in its errors by exonerating the Respondents in the false broadcast that Petitioner "blocked the search warrant." Although conceding the apparent derogatory nature, the trial court exonerated the Respondents because in a subsequent report, the Respondents explained what they meant. (Apx. 4, p 14).

The Minnesota Court of Appeals glossed over the constitutional principles on the ground that expression of opinion is a question of law for the trial court and is a constitutional protection involving criticism of official conduct under *New York Times Co. v. Sullivan.* (Apx. 3, p. 5.) The same rationale under the same general catagory of First Amendment protection was granted, without any detailed consideration of the actual broadcast statements, with regard to the broadcast that Petitioner blocked a

search warrant and the broadcast about Petitioner's conflict of interest. (Apx. 3, p. 6, 7.) The Court of Appeals concluded that the broadcast of the conflict of interest was based on fact and coupled with opinion and legitimate criticism of the public official. (Apx. 3, p. 7.)

The Court of Appeals decision was denied review by the Minnesota Supreme Court. (Apx. 1.)

The Minnesota courts totally ignored the prevailing principles that broadcast by videotape placing petitioner in a false light and in improper context involves right to a trial by jury and not an exoneration under the First Amendment. *Berkus v. NBC*, 161 Ill. app. 3d 476, 515 N.E.2d 668 (1987).

The Minnesota courts erred in saying that there were no unreported facts. (Apx. 3, p. 9.) The fact of the matter is the falsity by itself inherently implies omitted, unreported facts. Furthermore, the record was replete with evidence that the Petitioner never talked with Dr. McGee, something not reported; that Petitioner never participated in anything involving the Greening investigation until November, 1985, and not broadcast; that Petitioner did not know about the purported conflict of interest letter of 1982 until three years later; that Petitioner took no action on the Roseville Police Department inquiry on the search warrant, not reported in context; and that the medical examiner if asked would have stated that no none told him not to change the death certificate, not reported by the Respondents. This must constitute evidence of reckless disregard within the meaning of *New York Times v. Sullivan*. See *Harte-Hanks Communications, Inc. v. Connaughton,* U.S. , 109 S.Ct. at 2686. "A report that intentionally excludes information that is as obviously exculpatory as the information *** elected to delete simply cannot, under any definition, be deemed either fair or accurate." *Schiavone Const. Co. v. Time, Inc.*, 847 F.2d 1069, 1089 (3rd Cir. 1988).

This Court stated in *Harte-Hanks* that " *** the reviewing court must consider the factual record in full. " U.S. , 109 S.Ct. at 2696. The lower courts here obviously never did so. It is significant that Justice Blackmun's concurring opinion pointed out so that the Supreme Court

has not strayed from the principle that " *** the form and content of the story are relevant not only to the falsity and neutral reportage questions, but also to the question of actual malice." U.S. , 109 S.Ct. at 2699-2700. Justice Blackmun pointed out that the method of presentation of the news is relevant to determining whether the publisher acted in reckless disregard of the truth. He added that the Court's opinion could not " *** be read to hold that the content of the article is irrelevant to the actual malice inquiry."

That is consistent with this Court's opinion in *Curtis Pub. Co. v. Butts* 388 U.S. 130 (1967), where the Court held that the preparation may cast serious doubt on the adequacy of the investigation, obviously a factor relevant to determining actual malice. 388 U.S. at 138. Resolving issues that were uncertain in a way to cast Petitioner in the worst possible light may be considered evidence of the report as reckless disregard for the truth or falsity. *Rebozo v. Washington Post Co.*, 637 F.2d 375, 382 (5th Cir. 1981) cert. den. 454 U.S 964.

This Court should grant review of this matter because of the errors of application of *New York Times v. Sullivan* by the Minnesota courts. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 330 (1974). The Court should then reverse the Minnesota courts and remand.

Respectfully submitted,

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By: _____
Patrick Foley

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APPENDIX A

STATE OF MINNESOTA

IN SUPREME COURT

No. C0-89-1225

TOM FOLEY,

Appellant,

vs.

WCCO TELEVISION, INC., et al.,

Respondents.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Tom Foley for further review be, and the same is, denied.

Dated:

February 9, 1990 BY THE COURT:

Chief Justice

APPENDIX B

STATE OF MINNESOTA

IN SUPREME COURT

TOM FOLEY,

Petitioner,

vs.

WCCO T.V., Inc., a corporation, STEVE ECKERT, and JOHN LINDSAY,

Respondents.

PETITION FOR REVIEW OF DECISION OF COURT OF APPEALS

Appellate Court Case No:

Date of Filing of Court of Appeals Decision: December 26, 1989.

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STATE OF MINNESOTA
IN SUPREME COURT

TOM FOLEY, *Petitioner,* vs. WCCO T.V., Inc., a corporation, STEVE ECKERT, and JOHN LINDSAY, *Respondents.*	**PETITION FOR REVIEW OF DECISION OF COURT OF APPEALS** Appellate Court Case No: Date of Filing of Court of Appeals Decision: December 26, 1989.

TO: The Supreme Court of the State of Minnesota:

I.

LEGAL ISSUES

A. Whether the court of appeals erred in interpreting the United States Constitution First Amendment principles when it held as non-defamatory false statements implying that plaintiff was guilty of unethical and criminal conduct.

B. Whether the Court of Appeals erred in holding, under First Amendment principles, that there was an inadequate record demonstrating a jury issue on actual malice by the respondents.

II.

CRITERIA FOR REVIEW UNDER RULE 117, SUBD. 2

This Court should grant discretionary review of the Court of Appeals decision because the legal issues presented are important and those upon which this Court should rule; the lower courts have departed from the accepted and usual course of justice as to call for an exercise of this Court's supervisory powers; and a decision by this Court will help to

clarify and harmonize the law on the legal issues involved because of their possible statewide impact. Rule 117, R.Civ.App.P.

III.

STATEMENT OF THE CASE

Petitioner filed suit in Ramsey County District Court for damages from defamation as uttered by the respondents, news media within the meaning of the First Amendment of the United States Constitution and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Petitioner proved the falsity of the published statements, including, "The Ramsey County Medical Examiner's office officials say they were told not to change the death certificate from accident to murder by Foley." "I-Team member Steve Eckert suggest that Foley's receipt [of political contributions] caused Foley's intervention * * *." Z-1, Apx. 433. "He [Foley] knew Greening was a potential suspect, yet took money from him at least two times after. There is something there. Z-6, Apx. 434. The trial court held that "Foley blocked the search warrant" appeared to be derogatory. Other broadcasts implied that petitioner had telephoned the Attorney General's office and thereafter a state investigator was "taken off the case." "* * * if investigators knew of the possible conflict of interest in 1982, why it took three years for Foley to remove himself from the case."

The trial court held that all of the broadcasts other than references to the Ramsey County Medical Examiner's scenario were as a matter of law not defamatory and the latter be dismissed for absence of adequate evidence of actual malice.

The Court of Appeals affirmed the District Court decision. Apx. A.

IV.

ARGUMENT

The Court of Appeals ruling is inconsistent with *Diesen v. Hessburg*, 437 N.W.2d 705 (Minn. Ct. App. 1989), Pet. Grtd.

442 N.W.2d 7891 (1989), now pending before this Court, and *Harte-Hanks Comm., Inc. v. Connaughton,* _____ U.S. _____, 109 S.Ct. 2678 (1989). The court of Appeals was told specifically in oral argument despite its statement, Apx. A, p. 8, Par. 5, that the broadcasts could have been rendered non-defamatory if the truth were told and the facts were itemized for that Court that petitioner did not talk with the medical examiner; took no action involving the Greening investigation; was not involved in a conflict of interest; took no action on the search warrant; never asked the AG's office to remove the investigator.

Any broadcasts of false facts showing a lack of character or disregard of professional ethics of an attorney are defamatory. *Wachs v. Winter,* 569 F.Supp. 1438 (D.C.N.Y. 1983), even expressions of opinion. *Cianci v. New York Times Pub. Co.,* 639 F.2d 54, 64 2d Cir. (1980); *King v. Globe Newspaper Co.,* 400 Mass. 705, 512 N.E.2d 241 (1987); *Harte-Hanks Comm., Inc. v. Connaughton, supra,* 109 S.Ct. at 2683 FN 3.

The Court of Appeals failed to make an independent review as required by *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255-56 (1986), to determine the issue of petitioner's evidence demonstrating actual malice. The Court acknowledges that petitioner never asked McGee to change the death certificate, but exonerated respondents by stating petitioner's assistant discussed the matter with Dr. McGee and held that those acts "may be attributable to him [petitioner] for this purpose." Apx. A, p. 12. Evidence of actual malice is the respondent's plan to interview the M.E. to tie in petitioner with the delay in a death certificate change. Apx. F. Respondent interviewed the M.E. and did not question him about this petitioner. This is actual malice. In *Harte-Hanks Comm., Inc. v. Connaughton, supra,* the reporters interviewed Connaughton, had specific denials from Connaughton, knew of a sharp conflict on the various versions; knew that there was a critical witness, whom they never interviewed. The Supreme Court found actual malice on the reporters' refusal to interview the critical witness. 109 S.Ct. at 2697. Blackmun, J. emphasized that "* * * the form

and content of the story are relevant not only to the falsity in neutral reporter's questions, but also to the question of actual malice." 109 S.Ct. at 2699-2700.

The Court of Appeals is at odds with *Diesen* and inconsistent with *Connaughton*. Defamation of a public official may be by implication. *Connaughton* and *Diesen* settle that. The court of appeals failed to hold that proof of actual malice may be by circumstantial evidence.

The Court of Appeals held subsequent descriptions or explanations to exonerate respondents. Apx. A, p. 6, Section B. The court erred in holding that there was a conflict of interest even if petitioner did not know of the letter or participate in the investigation. Apx. A, p. 7.

Actual malice is clearly demonstrated by the thoughtful dissent of Judge Randall that petitioner made out a reasonable case "at every juncture," Apx. A, p. D-2, and that "* * * defamation is concocted out of truth taken out of context, omitted facts, unbalanced reporting, and slants designed to do injury." Apx. A, p. D-6.

CONCLUSION

The broadcasts were not about the processes but were fake reports about this petitioner's part in the investigation, the blocking of the search warrant, and the delaying of the change of the death certificate. The Court of Appeals argument, that "Foley was not personally involved in the death certificate discussion." Apx. A, p. 12, but a conflict of interest even if petitioner had not participated in the investigation.

This Court should grant this review because the Court of Appeals decision is clearly inconsistent with its own opinion in *Diesen* and clearly inconsistent with and contradicted by the U.S. Supreme Court decision in *Connaughton*.

Respectfully submitted,

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APPENDIX C
STATE OF MINNESOTA
IN COURT OF APPEALS
NO. C0-89-1225

HENNEPIN COUNTY

TOM FOLEY,
Apellant,

vs.

WCCO TELEVISION, INC., et all.,
Respondents.

Gardebring,
Judge Dissenting,
Randall, Judge

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Filed: December 26, 1989
Office of Appellate Courts

SYLLABUS

1. Statements consisting of truths, opinions, and criticisms of official conduct are not defamatory as a matter of law.

2. A public figure must produce clear and convincing evidence upon which a jury could find actual malice to defeat a summary judgment motion brought in a defama-

tion action.

Affirmed.

Heard, considered, and decided by Gardebring, Presiding Judge, Forsberg, Judge, and Randall, Judge.

OPINION

GARDEBRING, Judge

Appellant Tom Foley commenced this defamation action against respondent WCCO-TV and its I-Team reporters contending that WCCO-TV aired broadcasts of a defamatory nature against Foley. The broadcasts concerned Foley's position as Ramsey County Attorney and the alleged failure of his office to properly investigate and resolve the manner of death of a Launderdale, Minnesota woman.

Foley appeals the trial court's dismissal of numerous allegations for failure to state a claim upon which relief may be granted and entry of summary judgment against him on the remaining allegations. We affirm both the trial court's order dismissing the nonactionable allegations and the order granting summary judgment on the remaining allegations.

FACTS

On July 21, 1982, a woman's naked body was found under water in the bathtub of her Lauderdale, Minnesota home. There was no evidence that she intended to take a bath nor that she intended to commit suicide. Furnishings in the woman's bedroom indicated possible signs of a struggle.

Initially the Roseville police department investigated the woman's death. The case was presented to the Ramsey County Attorney's Office but no charges were ever brought. At that time, Dr. Michael McGee, the medical examiner, listed the manner of death as "undetermined." However, by the fall of 1985, Dr. McGee was considering changing the manner of death designation on the death certificate to "homicide."

In early 1986, at the urging of a friend of the deceased,

WCCO-TV began a review of the death, and its handling by the criminal justice system. The I-Team investigated the matter by reviewing police reports, interviewing officials involved in the case and close friends of the deceased. On February 27, 1986, the station aired the first of several broadcasts discussing the death and the law enforcement activities surrounding it. WCCO-TV admits the general tone of the broadcasts was critical of all public officials and agencies involved in the investigation, including Tom Foley and the Ramsey County Attorney's Office.

Foley commenced this action against WCCO-TV alleging that the I-Team initiated an investigation into Foley for the purpose of defaming him, and has acted deliberately and repeatedly with actual malice to him and with reckless disregard to the falsity of the matters asserted with respect to the investigation of this woman's death.

Foley alleged numerous statements having possible defamatory meaning. Upon the trial court's order, Foley filed a more definite pleading consisting of 197 statements alleged to be defamatory. The trial court separated Foley's allegations into four factual scenarios and analyzed them for defamatory content. The scenarios are: (1) that Foley requested the Attorney General's office to remove a state investigator from the case; (2) that Foley blocked the issuance of a search warrant to search the financial records of the deceased's husband, one of his campaign contributors and a suspect in the murder investigation; (3) that Foley was aware of an inherent conflict of interest involving himself and the deceased's husband; and (4) that Foley asked Medical Examiner Dr. Michael McGee not to change the designation on the death certificate from "undetermined" to "homicide."

The trial court dismissed the first three factual scenarios for failure to state a claim upon which relief may be granted and subsequently entered summary judgment against Foley on the fourth scenario.

ISSUE

1. Did the trial court err in dismissing allegations for failure to state a claim upon which relief may be granted?
2. Did the trial court err in granting summary judgment?

ANALYSIS

I.

Allegations Dismissed for Failure to State a Claim Upon Which Relief Can be Granted

A plaintiff suing in defamation is required to plead and prove that the defendant published a statement of fact, that was false, that concerns the plaintiff, and that tends to harm the plaintiff's reputation and to lower him or her in the estimation of the community. *Lewis v. Equitable Life Assurance Society*, 389 N.W.2d 876, 886 (Minn. 1986).

In reviewing cases dismissed for failure to state a claim on which relief can be granted, the appellate court determines whether the complaint sets forth a legally sufficient claim for relief.[1] *Elzie v. Commissioner of Public Safety*, 298 N.W.2d 29, 32 (Minn. 1980).

Truth is a complete defense, and true statements, however disparaging, are not actionable. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980). Opinions are also absolutely protected by the first amendment. *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1431 (8th Cir. 1989).

> Under the first amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of

[1] In this case, the court determined that Foley failed to adquately specify the claimed defamatory language in the original complaint, and ordered Foley to submit a more detailed recitation of the alleged defamatory statements. Our review of the legal sufficiency of the claims is therefore based upon the statement entitled "Plaintiffs Allegations of Specific Words Establishing Defamation," as well as the complaint itself.

other ideas. But there is no constitutional value in false statements of fact.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (footnote omitted).

Whether a statement is one of opinion, hence absolutely protected by the first amendment, or one of fact, is a questions of law for the trial court. *See Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1305 n.7 (8th Cir. 1986) (en banc), *cert. denied*, 479 U.S. 883 (1986).

Furthermore, Foley's allegations must be considered against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

* * *

Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

New York Times Co. v. Sullivan, 376 U.S. 254, 270, 273 (1964).

The trial court considered the alleged defamatory statements contained in each factual scenario in light of what is legally required to state an actionable claim for defamation of a public official.

A. *Scenario 1: Removal of Investigator*

WCCO-TV reported that an investigator from the Minnesota Attorney General's Office began to assist the Roseville police in the investigation; that when Foley learned of the investigator's involvement, he called a deputy attorney general, who subsequently removed the investigator from the case because he did not want it to appear that Ramsey County was conducting the investigation inadequately; and that Foley denied requesting the removal of the investigator from the case.

The trial court determined that this was a factual account of the events as they occurred. Furthermore, the court stated that the questions raised by WCCO-TV concerning this scenario were editorial opinions and legitimate criticisms of public officials. We agree.

B. *Scenario 2: Search Warrant*

WCCO-TV reported that Foley's office blocked a search warrant to search the financial records of the deceased's husband. A subsequent report clarified that this meant Foley's office believed the police lacked probable cause to justify issuance; however, a warrant could have been obtained by appearing before a judge.

The trial court determined that the warrant was, in fact, denied and, viewing the statement in context, the subsequent explanation was sufficient to obliterate any possible inference that Foley sought to obstruct justice by opposing the search warrant. We concur.

C. *Scenario 3: Conflict of Interest*

In its I-Team broadcasts, WCCO-TV reported that the deceased's husband was a suspect in the case, and that he and 25 of his co-workers were contributors to Foley's re-election campaign and that some of the co-workers were members of Foley's campaign committee. This, WCCO-TV reported, created a conflict of interest. In October 1982, a letter was sent from the Roseville police department to the Ramsey County Attorney's Office suggesting the presence of a conflict of interest; however, it was not until three years later that the case was transferred to Anoka County to avoid the conflict. WCCO-TV questioned and criticized the delay in transferring the case to Anoka County.

The trial court determined that a conflict of interest clearly existed and that WCCO-TV's reporting of the matter was factually based and coupled with opinion and legitimate criticism of a public official and his office.

Even if Foley did not personally know of the letter or did not actively participate in the investigation until November 1985, the Ramsey County Attorney's Office did have knowledge of the potential conflict of interest and was in charge of the investigation. A conflict of interest arises when a

lawyer's representation may be materially limited by the lawyer's own interests. Minn. Rules of Professional Conduct 1.7. Conflicts of interest may be imputed to all lawyers associated with that firm. Minnesota Rules of Professional Conduct 1.10(a). From the facts, it appears that WCCO-TV had a reasonable basis upon which to conclude that a conflict of interest existed and to question the delay in transferring the case to Anoka County; therefore, we agree with the trial court's conclusion.

D. *Defamation by Innuendo*

Appellant also argued before the trial court that many of the statements, even if true on their face, are defamatory by innuendo.

The trial court, relying on *Valento v. Ulrich*, 402 N.W.2d 809 (Minn. Ct. App. 1987), and *Hirman v. Rogers*, 257 N.W.2d 563 (Minn. 1987), held that there can be no defamation of a public official by innuendo.

On appeal, appellant renews this argument, citing *Diesen v. Hessburg*, 437 N.W.2d 705 (Minn. Ct. App. 1989), *pet. for rev. granted*, 442 N.W.2d 781 (Minn. May 12, 1989), a case handed down by this court since the trial court ruling.

However, the *Diesen* rationale is inapplicable on these facts. The *Diesen* holding turned, first, on the existence of known facts which, if reported, could have changed the defamatory implication of the article, and secondly, on the plaintiff's proof of actual malice by clear and convincing evidence.

In this case, Foley has not pleaded, nor does the record reveal, any additional material facts that the I-Team knowingly omitted which would have removed the allegedly defamatory tone of their broadcasts.

Further, the law is clear that in a defamation action brought by a public official, the constitutional guarantees of the first amendment preclude recovery absent a showing that the statement was made with "actual malice." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). Actual malice has been defined as "knowledge that [the statement] was false of reckless disregard of whether it was false or not." *Id.* at 280. Actual malice must be proven with convincing clarity. *Id.* at 285-86.

Because the actual malice standard is the cornerstone of protection for free exchange of ideas about public officials, it may never be presume or inferred by innuendo. *Hirman*, 257 N.W.2d at 566.

In the absence of either unreported facts which could have changed the implication of the broadcasts or clean and convincing evidence of actual malice, *Diesen* does not apply.

We have reviewed the dismissed statements in light of the above considerations and we agree with the trial court that the numerous allegations contained in these three factual scenarios consisted of truths, opinions, and criticisms of official conduct, and that further the theory of defamation by innuendo is not available on these facts; therefore, the trial court's dismissal of these allegations for failure to state a claim upon which relief may be granted is no erroneous as a matter of law.

II.

SUMMARY JUDGMENT ON THE BASIS OF THE ABSENCE OF ACTUAL MALICE

The trial court determined that one fact scenario appeared to be capable of defamatory meaning, and therefore actionable. This set of statements became the subject of the later summary judgment motion. The factual setting of those alleged defamatory statements concern Medical Examiner Dr. Michael McGee and the cause of death designation on the deceased's death certificate.

Dr. Michael McGee performed the autopsy on the woman and marked on the death certificate that the manner of death was "undetermined." In 1985, three years after the autopsy, McGee decided he wanted to change the "undetermined" classification to "homicide." He contacted Roseville police officer Lunzer and assistant Ramsey County attorney Charles Balck, who had been assigned by Foley to review this case.

On November 5, 1985, a meeting to review the matter was attended by Balck, McGee, Lunzer, and James Essling, an

investigator for the medical examiner's office. Balck and Lunzer concluded that even if the manner of death was changed, there was insufficient evidence to obtain criminal charges. All four men agreed not to change the death certificate.

On February 27, 1986, Dr. McGee changed the death certificate to "homicide." That same day, Foley called a press conference and denied mishandling the case and informed the media that the case was being transferred to the Anoka County Attorney's Office to avoid any potential conflicts of interest. The case subsequently went to a grand jury. No indictment was issued.

WCCO-TV's report of the above incident included a quote from Dr. McGee:

> [A]nd so we've tried to cooperate with them in that regard and have essentially done what they've asked us. *** They've asked us at this time to hold the death certificate in the position it is now until they can explore any further examination they have to do.

The trial court did not strike the McGee allegations from Foley's complaint; however, it did grant summary judgment in favor of WCCO-TV upon finding no evidence indicating actual malice.

On appeal from a summary judgment the reviewing court determines whether there are any genuine issues of material fact and whether the trial court erred in its application of the law. *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989).

Because Foley holds the elected position of Ramsey County Attorney and performs governmental duties directly related to the public interest, he is a public official and, therefore, must prove actual malice before any defamation can be found. *Harte-Hanks Communications, Inc. v. Connaughton,* U.S. , , 109 S.Ct. 2678, 2685 (1989); *Hirman v. Rogers*, 257 N.W.2d 563, 566 (Minn. 1977). Actual malice requires proof that the statement was made with knowledge that it was false or with reckless

disregard of whether it was false or not. *New York Times Co.*, 376 U.S. at 279-80.

> [R]eckless conduct is not measured by whether a reasonable prudent man would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

On appeal from summary judgment in public figure defamation cases, the test is whether the evidence in the record could support a reasonable jury finding that the plaintiff has shown actual malice by clear and convincing evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986).

In considering WCCO-TV's motion for summary judgment, the court had considerable information before it. This information included the pleadings, discovery documents, motions and accompanying memoranda, scripts of the I—Team broadcasts, and tapes of a telephone conversation between the deceased's close friend and Investigator Essling indicating that Foley's office made the request. The record also included the press release issued by Foley on February 27, 1986, and affidavits of Foley, McGee, Balck, Essling and I-Team reporters Steve Eckert and John Lindsay.

Foley asserts that actual malice is demonstrated by WCCO-TV's repeated broadcasts that Foley's office requested McGee not to change the death certificate. Foley's picture accompanied this segment of the I-Team report. In particulary, Foley contends that actual malice is shown by the I-Team's failure to ask McGee the ultimate question, that is, whether Tom Foley personally asked McGee not to change the death certificate classification from "undetermined" to "homicide."

The affidavits reveal that Foley never personally asked

McGee to change the death certificate; however, the affidavits and press release show that Foley asked assistant county attorney press release show that Foley asked assistant county attorney Balck to review the case file and that Balck advised McGee against changing the death certificate because it would not change the fact that there was insufficient evidence to charge any suspect.

Balck is an employee of Foley's office and was acting within the scope of his employment. Therefore, we believe that although Foley was not personally involved in the death certificate discussion, the acts of Balck may be attributable to him for this purpose. In addition, WCCO-TV specifically broadcasted McGee's press statement that the Ramsey County Attorney's Office never *instructed* him not to change the death certificate.

Upon independent review of the record, we find that WCCO-TV investigated this matter by reviewing public documents and interviewing the public officials and private citizens involved in this case. The record is devoid of evidence that WCCO-TV broadcasted its report knowing that the information was false or that WCCO-TV entertained serious doubts as to the truth of its publication; therefore, we conclude that summary judgment is proper in the absence of any issues of material facts relating to actual malice.

While the dissent in this matter argues that summary judgment is a "blunt instrument," in public official defamation cases summary judgment is the preferred remedy because it prevents persons from being discouraged in the full and free exercise of their first amendment rights with respect to the conduct of their government. *See Washington Post Co. v Keogh*, 365 F.2d 965, 967-68 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967). We believe its use and application here is appropriate.

DECISION

Many of Foley's claims were dismissed properly for failure to state a claim upon which relief can be granted because they were not defamatory. Further, Foley failed to

produce clean and convincing evidence that could support a reasonable jury finding that WCCO-TV's I-Team broadcasted its reports with actual malice. We reviewed the remainder of Foley's claims on appeal and find them to be without merit under the facts of this case.

Affirmed.

RANDALL, Judge, dissenting.

I respectfully dissent. I do not find this complicated case at this time, on this record, appropriate for disposition by a Rule 12 motion for judgment on the pleadings and/or summary judgment.

The voluminous record contains numerous disputed fact issues and allegations by appellant that key facts were known, but omitted or slanted. Appellant argues vigorously that a jury is entitled to see the entire picture, and that if they resolve certain inferences in this favor actual malice could be found. There are several key areas in dispute. What did appellant actually know; what did appellant actually do; and what did respondents really know about what appellant did or did not do, as opposed to what they actually published.

Relative to appellant's allegations that were dismissed on respondents' motion for summary judgment, the record discloses disputed facts issues concerning who, if anyone, from appellant's office put pressure on Dr. McGee not to change a death certificate from undetermined to homicide. Did appellant do it? Did appellant authorize someone else to do it? Was it "pressure" or just a common sense decision not to make a hurried change just because of publicity? Did respondents know this but continue to intentionally imply that the pressure or suggestion not to change the death certificate came from appellant himself?

On the issues disposed of by granting respondents' motion for judgment on the pleadings, I find it difficult to hold, as a matter of law, that appellant could not produce facts which, if proven, could lead a reasonable jury to find defamation. On the issue of whether appellant contacted the attorney general's office to remove an investigator from the case, there is a dispute over whether the investigator

was actually "removed" and a dispute as to whether appellant deliberately requested a "removal," if one occurred.

Relative to the search warrant, did appellant "block" it in the perjorative sense or was the decision made based on reasonable judgment by a prosecuting attorney that probable cause for a search warrant could not be found. Did respondents subsequent "clarification" remove all taint or did the implication linger that appellant deliberately hindered an ongoing investigation? On the issue of the suspect's political contributions, were the amounts so insignificant and their timing such that respondents, with years of experience covering local, state, and national elections, knew that the minimal amount in question could not influence a homicide investigation. If they knew that, did they intentionally broadcast a partial story to imply otherwise? I am not in a position to weigh the merits of appellant's ultimate case to a jury. However, I can say with reasonable conviction that if all factual disputes and all are answered by a jury in appellant's favor, the high threshold a public official needs to meet to prove actual malice could be satisfied.

Appellant makes out a reasonable case that at every juncture, the broadcasts put him in as bad a light as possible. Did respondents actually know the facts which would have dramatically changed the slant they were putting on the story? If they knew, then, did they intentionally withhold them with "reckless disregard for truth or falsity?"

The majority correctly points out that a public official has a heavy burden of proof in a defamation case.

> Actual malice requires proof that the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279, 84 S.Ct. at 7261 (1964).

> Reckless conduct is not measured by whether reasonable prudent person would have published or would have investigated before

> publishing; rather, there must be sufficient evidence to conclude that the defendant in fact entertained serious doubts as to the truth of its publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

However, I find that this burden of actual malice can be met short of proof that there were out and out deliberate lies. In a case presently before the Minnesota Supreme Court, *Diesen v. Hessburg*, 437 N.W. 2d 705 (Minn. Ct. App. 1989), this court, relying on a Tennessee Supreme Court case, *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978), found that statements, even if true taken in their literal context could amount to defamation. In *Deisen* we said:

> In *Nichols*, a private citizen was allegedly defamed by the implication that she was having an adulterous affair with a neighbor's husband. If all the facts had been printed by the paper, this defamatory and false implication would not have been created. The court in *Nichols* stated that the defendant's reliance on the truth of the facts was misplaced because the question was "whether libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Id.* at 420 (quoting *Fleckenstein v. Friedman*, 266 N.Y. 19, 23, 193 N.E. 537, 538 (1937)). The publication of the complete facts could have conceivably led the reader to conclude that there was no adulterous relationship.
>
> The published statement, therefore, so distorted the truth as to make the entire article false and defamatory. It is no defense whatever that individual statements within the article were literally true. Truth is available as an absolute defense only when the defamatory meaning conveyed by the words is true.

Id.

> We agree with the holding in *Nichols*. There may be defamation by implication, where known facts are omitted, which could have changed the defamatory implication of the article. It is clear that this is a half-truth, which amounts to merely a lie.

Diesen, 437 N.W.2d at 709.

Respondents argue vigorously that in all respects truth is a complete defense. However, I find that the defense of "truth" is not confined to an examination of just the five alphabetical components of the word.[1]

Here, appellant may be able to prove a case of defamation by implication discovered in *Diesen*. The thrust of respondents' broadcasts was that appellant, a prominant elected official, has intentionally stonewalled and interfered with a homicide investigation because a suspect was a political contributor. The content and slant of the broadcasts permit no other inference. This inference was intentionally and deliberately created by respondents.

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[1] The following story is likely apocryphal but serves to illustrate the point. Supposedly years ago in a small southern town, the editor of the local newspaper chose up sides against the mayor running for re-election and threw his newspaper support behind the challenger. On the evening before election day, the editor bannered the headline "Mayoral Incumbent Caught Eating a Dead Female Thigh." The predictable happened. The next day the town had a new mayor and the defeated incumbent, not being at all convinced of his participation in such a dastardly deed, hired a law firm to investigate and bring suit. Upon completion of the investigation, it came out that at a Sunday Church social one month before the election the mayor, his wife, his two children, and his grandparents were in attendance where the main course was roast turkey with all the trimmings. The newspaper editor, sitting at an adjoining table, observed the mayor holding a napkin in front of his face (because his socially conscious mother disapproved of adults eating in public with their fingers) while avidly chomping on a hen turkey drumstick. At trial, when the "fowl" facts came to light, over the editor's protestations that every word in the headline was defendable, the judge did find that a suit did lie.

did lie.

The allegations are extremely serious. They are in a proper area, governmental activity, for the media to scrutinize, but the media's privileges are not unbounded. The first amendment is a high and mighty wall, but does not stretch to infinity.

When hearing motions for failure to state a claim upon which relief can be granted or summary judgment, courts are not asked to weigh evidence, determine credibility, resolve factual disputes, and decide the merits of a plaintiff's case. Instead, a court's duty is simply to determine if a claim could ever lie, and as to summary judgment, our duty is simply to determine whether genuine issues of material fact exist, "*not how such issues should be resolved.*" *Vacura v. Haar's Equipment, Inc.*, 364 N.W.2d 387, 391 (Minn. 1985) (emphasis added). To make this determination, the evidence must be viewed in the light most favorable to the non-moving party, and "all doubts and factual inferences must be resolved against the moving party." *Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981). Summary judgment "is not intended as a substitute for trial ***." *Vacura*, 364 N.W.2d at 391 (citation omitted). Because summary judgment is a "blunt instrument," its use should be limited to cases in which "it is perfectly clear that not issue of fact is involved." *Donnay V. Boulware*, 275 Minn. 37, 45, 144 N.W.2d 711, 716 (1966). This is not such a clear case; consequently, disposition by summary judgment is inappropriate, as is disposition by dismissal for failure to state a claim on which relief could be granted.

Appellant's status as a public figure[2] prevents him from receiving any damages absent proof of actual malice, *New York Times*, 376 U.S. at 279, but I suggest at this stage enough of a case exists to present to a jury. Although the *New York Times* standard of actual malice is high, we need to avoid getting hung up on the term "actual malice." In

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[2]Generally, false allegations which attach a person's professional conduct are defamatory per se. *Becker v. Alloy Hardfacing & Engineering Co.*, 401 N.W.2d 655, 661 (Minn. 1987); *Lee v. Metropolitan Airport Commission*, 428 N.W.2d 815, 819, (Minn. Ct. App. 1988).

reality, media people (unless they are looking for another job and want to draw unemployment compensation during the search) do not come right out and start a story by stating, "I have malice against you and intend to publish deliberate falsehoods." Rather, defamation is concocted out of truth taken out of context, omitted facts, unbalanced reporting, and slants designed to do injury. Generally, in all civil cases the plaintiff's burden of proof is rarely made easy by frank admissions by a defendant to all the essential elements that a plaintiff needs to make a case. The purpose for factfinders is often to sift through half truths and distortions. Plaintiff is entitled to build a case, carefully laid evidentiary block upon block, and strive to convince a jury that the implications and inferences he wants drawn were so intended by defendant.

I do not find the broad shield of the first amendment impervious to appellant's attack at the pretrial stage. Ultimately at trial, respondents could prevail but sufficiency of the evidence is not now the issue on appeal. Based on tis record, I believe that is a jury resolved all inferences for appellant and against respondents, it could find actual malice.

The trial court did a conscientious job on setting up and analyzing the issues. But I cannot escape the feeling that the trial court, in effect, conducted a "mini trial" on the issues, weighed evidence and credibility, and came to the conclusion that appellant probably would not prevail at trial. Summary judgment is not the proper forum to resolve disputed issues, but rather to see if genuine issues of material fact exist. *See Hinrichs v. Farmers Cooperative Grain & Seed Association*, 333 N.W.2d 639, 641 (Minn. 1983).

If this case proceeds to trial, the trial court still has three stages at which it can exercise discretion to prevent an unjust result. The trial court can direct a verdict for defendant at the close of plaintiff's case or at the close of all the evidence, but before the case goes to jury. Additionally, the trial court can grant a judgment notwithstanding the verdict if the case goes all the way to a jury verdict, but the

court feels a manifest injustice has been done. Each of these dispositions, although as drastic as summary judgment, display an inherent fairness to a plaintiff that summary judgement and pretrial dismissals do not, as these three alternatives at least allow the plaintiff to present a case. If, upon the conclusion of plaintiff's presentation, the trial court decides that the plaintiff cannot prevail, as a matter of law, and dismisses, the plaintiff had a day in court. Summary judgment and dismissal on the pleadings have a legitimate place in the legal system, but should not be a substitute for trial and were never meant to be a calendar control device in jurisdictions with high case loads.

In conclusion, I would find that appellant has at least presented claims upon which relief could be granted. As to the propriety of summary judgment, I find unresolved material and substantial fact questions. I would order the parties to complete pretrial discover, and proceed to trial on the merits.

APPENDIX D

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

No. 87-4560

TOM FOLEY,

Plaintiff,

vs.

WCCO T.V., Inc. a corporation,
STEVE ECKERT, and JOHN LINDSAY,

Defendants.

ORDER

A motion for dismissal for failure to state a claim upon which relief can be granted and/or failure to comply with the Court's order of November 2, 1987, can on for hearing before the undersigned, one of the judges of the above-named Court, on December 19, 1987.

Patrick Foley, Esq., appeared on behalf of the plaintiff. Paul Hannah, Esq., and Paula Osborn, Esq., appeared on behalf of the defendants.

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED:

That the following paragraphs of plaintiff's complaint incorporating plaintiff's allegations of specific words establishing defamation are *dismissed for failing to state a claim upon which relief can be granted:*

All paragraphs A through Z-18 except C-1, D-7, D-8, D-9, D-10, D-19, H-9, M-2, M-3, O-1, O-2, P-3, P-4, T-14, T-15, T-16, T-17, U-3, V-3, Z-1(2), Z-1(7), Z-5(1), Z-6(1), Z-8(8).

BY THE COURT:

Robert G. Schiefelbein

Dated:
March 16, 1988

APPENDIX E

MEMORANDUM

Defendants move this Court for an order, pursuant to Rule 12 of the Rules of Civil Procedure for the District Courts, granting dismissal of the plaintiff's complaint. It is defendants' contention that plaintiff's complaint fails on two separate grounds: 1) that plaintiff has failed to comply with the Court's order of October 2, 1987, where the court ordered the plaintiff to provide a more definitive statement of the claims, and 2) that the 44 "libelous statements" which plaintiff lists in the More Definite Statement do not as a matter of law state a claim for relief in defamation.

I

SPECIFICITY AND CONTEXT

A brief recitation of the procedural posture of this case is necessary in order to adequately address the issues presently pending before this Court. In response to the Court's finding that plaintiff has failed to adequately specify the claimed defamatory language in the original complaint, plaintiff filed a pleading entitled Plaintiff's More Definite Statement. In this document, plaintiff amplified the number of separate and distinct counts of allegedly libelous statements to 44. These 44 statements, numbered A through Z-18, are a curious miscengation of broadcast recitations in verbatim, and print media reporting, from a wide variety of sources. At oral argument on December 19, 1987, the Court advised the parties that, in order for this litigation logjam to be broken, the plaintiff should file a detailed recitation of the specific words which form the basis for the plaintiff's lawsuit for damages resulting from the alleged defamation. Plaintiff, in response, has now supplied the Court and defendants with the allegations of specifid words establishing defamation. This document details, as noted above, a series of broadcasts by the defendants, and a number of printed media reports from various sources. The

alleged singular defamatory statements number 197 in total.

It should be noted from the outset that plaintiff has vehemently protested this procedure. It is plaintiff's contention that, by forcing the plaintiff to reduce to specificity the defamatory allegations, the Court has merely bought into a clever ruse posited by the defendants. Plaintiff has stated from the outset of this litigation that the statements and the overall content of the broadcasts must be considered as a *whole*. Plaintiff asserts that this exercise in reduction of the statements to specificity is a tactic employed by the defendants to ensure that the individual claims will fall out of the lawsuit for failure to state a claim upon which relief can be granted. It is plaintiff's sincere contention that the Court must view the proverbial whole forest, and not dwell in the minutiae of the simple trees. In point of fact, plaintiff has stated, "cases uniformly hold that statements must be considered in context with the entirety of the articles or statements". Plaintiff's Allegations of Specific Words Establishing Defamation at 2. This Court is in complete agreement with the plaintiff. The law is clear that specific statements of defamatory import must be considered as a whole; they must be read in the context of the entire communications. *See e.g., Sharon v. Time, Inc.*, 575 F. Supp 1162 (1983); *Marcone v. Penthouse Intern. Ltd.* 533 F. Supp. 353 (1982).

It is the Court's role, at this juncture, to consider the 44 allegations of defamation to determine if each is capable of a defamatory meaning. The Court will consider these statements in the *context of the entirety of the broadcasts and printed media reports*. While the court concedes that the statements are to be considered in context, that does not relieve the plaintiff of the requirement to specify the defamatory statements. As early as 1898, the Supreme Court of Minnesota stated:

> ... it is well settled that the specific words which have been published must be set out. It is not sufficient merely to state the effect of the language or that the

> publication was of a certain defamatory tenor and import. The plaintiff cannot content himself with drawing his own inference from the words published, and then allege such inference, without apprising the defendant of the words of which he complains. While in actions for libel it may not be essential to set forth an entire article, it is absolutely necessary to set forth in precise words such parts or passages as are claimed to be actionable.

American Book Co. v. Kingdom Publishing Co., 71 Minn. 363, 73 N.W. 1089 (1898).

Further, in the landmark *Herbert v. Lando* litigation, Judge Haight specifically stated:

> A defamation plaintiff is obliged to specifically identify those statements which he claims were made with actual malice.

Herbert v. Lando, 596 F. Supp. 1178 at 1197 (S.D.N.Y. 1984).

In the instant case, plaintiff has persisted in refusing to distinguish between claimed defamatory statements and a determination of whether the statements made "are capable of a defamatory meaning ..." *Utecht v. Shopko Dept. Store*, 324 N.W.2d 652 (Minn. 1982). Accordingly, the Court has analyzed the rather voluminous allegations to synthesize what statements by the defendant appear to be actionable.

II.

ELEMENTS OF PRIMA FACIE CASE AND CONSTITUTIONAL IMPACT

A plaintiff suing for libel is required to plead and prove that the defendant published: 1) a statement of fact; 2) that is false; 3)that concerns the plaintiff and; 4) that tends to harm the plaintiff's reputation and to lower him or her in the estimation of the community. *See, Jadwin v. Minneapolis Star & Tribune Co.*, 390 N.W.2d 437 (Minn. Ct. App. 1986); *Lewis v. Equitable Life Assurance Society*, 389 N.W.2d 876 (Minn. 1986); *Stuemges v. Parke, Davis & Co.*,

297 N.W.2d 252 (Minn. 1980). In addition, as articulated in *NY Times v. Sullivan* and its progeny, a *public official must also prove that a defendant published the defamatory statement knowing it was false or with reckless disregard of whether it was false. NY Times v. Sullivan,* 376 U.S. 254 at 270-80 (1964); *see also, Hirman v. Rogers,* 257 N.W.2d 563 (Minn. 1977). to be actionable, a defamatory statement of fact about a public official must have been made with the above noted *"actual malice";* that is, the *NY Times* standard. In the instant case, it is clear that the plaintiff, Mr. Foley, is a public official. Mr. Foley is the Ramsey County Attorney. As such, his cause of action in defamation must satisfy the constitutional parameters of the law. In order for Mr. Foley to prevail, he must *demonstrate that defendants knew that the statements* they were publishing were *false,* or that they published the statements with a reckless *disregard* as to their truth or falsity.

It is true that this is a weighty burden for a public official defamation plaintiff to surmount. However, as will be demonstrated, there are strong historical policy reasons for the implementation of these jurisprudential obstacles in the path of a public official defamation plaintiff.

III.

OPINION

While the United States Supreme Court has constitutionalized the common law of defamation as it regards a public official, the prima facie elements discussed above are stil paramount as the initial threshhold of a cause of action in defamation. The issue of falsity of the alleged defamatory statements is central to the disposition of a defamation action; only false and defamatory statements of fact are actionable.

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend not on the conscience of judges and juries but on the competition of other ideas.

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); *see also,*

Capen v. Daugherty, 402 N.W.2d 561 (Minn. Ct. App. 1987).

The First Amendment to the United States Constitution holds statements of opinion as absolutely privileged. Whether a statement is one of opinion, hence absolutely protected by the First Amendment, or one of fact, is a question of law for the trial court. *Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir. 1986). In *Janklow*, the Eighth Circuit Court of Appeals articulated a 4-part test consisting of various factors to determine whether a statement is one of fact or opinion.

The *Janklow* factros are:

a) The precision and specificity of the disputed statement (the more imprecise, the more likely opinion);

b) The statement's verifiability (the less verifiable, the more likely opinion);

c) The literary and social context in which the statement was made (including the entire communication's tone, the use of cautionary language, the category of publication, its style of writing and intended audience); and

d) The statement's public context (consideration of the public or political arena in which the statement was made).

Capan v. Dougherty, 402 N.W.2d 561 (Minn. Ct. App. 1987) citing *Janklow*, 788 F2d at 1302-03.

Further, while it is clear that distinguishing fact from opinion is by no means a simple task, the definition of opinion is given a broad spectrum. Opinion has been equated with rhetoric, and figurative language, and is, in any event, not actionable if, in context, the audience would understand the statement is not a representation of fact. *Jadwin v. Minneapolis Star & Tribune Co.*, 390 N.W.2d at 441. If the statement is true in substance, inaccuracies of expression or detail are immaterial. *Id.*

Perhaps most significantly, given that it is the Court's task to construe the language of the alleged defamatory statements, the Court must give words their obvious and natural meaning "unless they are alleged to have been used and understood in a different sense." *Jadwin* at 442.

IV.

TRUTH

At common law a defamatory statement was presumed to be false. Truth was an absolute, affirmative defense. *See, Jadwin,* 367 N.W.2d at 480. A defendant accused of making defamatory statements had the burden of proving that the statements were true. The burden has now been shifted by the advent of the constituional parameters of the law of defamation. The burden is now upon the plaintiff to prove that the statements are false. In addition, *truth is a defense* to defamation only when *the underlying implicaiton* of the statement is true, *not* merely *when the statement is* verbally accurate. *Lewis,* 389 N.W.2d at 889.

The Court concedes that the truth or falsity of a statement is generally a question for the *trier of fact.* However, the Court would hasten to add that *it would only be* a jury question for statements that meet the *threshold* of being *capable of a defamatory meaning.* As such, it is clear that at this juncture, the simple truth of a statement would make it not actionable as a matter of law.

V.

Fair Comment; Qualified PRIVILEGE

In considering the overall context of the pending litigation, it should be noted that the parties involved are a public official and a media organization. This media organization, defendants, is actively engaged in the profession of news coverage, reporting, investigation, and commentary. A simple fact of the matter is that organizations engaged in the activity that defendants are engaged in have, since time immemorial, commented upon the activities of public officials. This idea and its machination go to the very heart of our present system of government. The media has long been referred to as the Fourth Estate. In addition to the checks and balances of the three prongs of government articulated by our Constitution, the media, both print and broadcast, serve a vital function as a watchdog of the affairs of government. Both federal and

state courts have long recognized a qualified privilege on behalf of the media to comment on the conduct of public officials. *See, e.g., Freidell v. Blakely Printing Co.*, 163 Minn. 226, 203 N.W. 974 (1925). This doctrine of privileged communication rests upon the above-noted public policy considerations. The law in Minnesota is:

> A. Communication, to be privileged, must be made upon a proper occasion, from a *proper motive*, and must be based upon a *reasonable or probable cause*. When so made in *good faith*, the law does not imply malice from the communication itself, as in the ordinary case of libel. Actual malice must be proved, before there can be a recovery, and in the absence of such proof, the plaintiff cannot recover.

Stuemges, 297 N.W.2d 256-57 (quoting *Hebner v. Great Northern Railway*, 78 Minn. 289, 292, 80 N.W. 1128, 1129 (1899).

In the instant case, it is clear that defendants have a historic qualified privilege to comment upon the affairs of a public official. The qualified privilege of the media defendant in this case is clearly within the above-articulated language. As such, allegedly defamatory statements that come within the penumbre of the qualified privilege of fair comment are not actionable.

To establish the defense of fair comment, the defendant has to show 1) that the published criticism was one of legitimate public interest, 2) that the criticism was based on facts either stated or otherwise known to the reader, 3) that the criticism represented the actual opinion of the critic, and 4) that the criticism was not made solely for the purpose of causing harm to the person criticized. *Ollman v. Evens*, 750 F.2d 970 at 974, note 5 (1984).

VI.

INNUENDO

Words are defamatory when they tend to injure the plaintiff's reputation and expose the plaintiff to public hatred, contempt, ridicule or degradation. Gadach v.

Benton County Co-op Ass'n., 236 Minn. 507, 53 N.W.2d 230 (1952). Words may be divided into those that cannot possibly have a defamatory meaning, those that are reasonably susceptible to a defamatory meaning as well as an innocent one, and those that are clearly defamatory on their face. *Morey v. Barnes*, 212 Minn. 153, 2 N.W.2d 829 (1942). In addition, a statement may carry a defamatory meaning only by reason of extrinsic circumstances. The question whether a claimed defamatory innuendo is reasonably conveyed by the language used is for the Court to determine. *Utecht v. Shopko Dept. Store*, 324 N.W.2d 652 (Minn. 1982). If the words are capable of a defamatory meaning, it is for the jury to decide whether in fact they were so understood. *Utecht* at 654.

In construing the language as set forth in the complaint, the Court must give the statement its obvious and natural meaning. *Jones v. Monizo*, 276 Minn. 371, 150 N.W.2d 213 (1967). *See, e.g., Phipps v. Clark Oil & Refining Corp.*, 396 N.W.2d 588 (Minn. Ct. App. 1986). When statements charged as defamatory are not so upon their face, it is for the Court to determine whether the construction of the language put forward by the innuendo is permissible. Marudas v. Odegard, 215 Minn. 357, 10 N.W.2d 233 (1943).

Plaintiff, in addition to his adamant urging that all 197 statements be considered as a whole, has additionally posited that many of the statements are defamatory only by innuendo. In other words, plaintiff asserts that the inference to be gleaned from a variety of the numerous allegations is, indeed, defamatory. Plaintiff has alleged that defendant colored the coverage of the events implicit to this litigation in such a manner as to lead to only one conclusion; Tom Foley used the power of his office, in various situations, to thwart the investigation into the murder of Kathy Greening. Plaintiff's primary assertion, from the outset of this litigation, has been that the totality of the broadcasts, laced with innuendo, is the sum of the defamation. It is plaintiff's primary belief, as noted *supra*, that to examine each statement as a singular premise will defeat plaintiff's cause of action. This Court is not so

persuaded. The law states that a cause of action in defamation shall set out with specificity the alleged defamatory statements. Further, the law is that the alleged defamatory statements shall be considered as a whole, in context with one another.

While the Court has considered the allegations in context, the issue of innuendo as relates to the instant case bears further examination. The hard line according to the Minnesota Supreme Court is that there can be no defamation of a public official by innuendo. *See, Valento v. Ulrich,* 402 N.W.2d 809 (Minn. Ct. App. 1987); *Hirman v. Rogers,* 257 N.W.2d 563 (Minn. 1977).

The Court in *Hirman* stated:

> If a defamation action brought by a public official falls within the constitutional constraints of the NY Times rule, actual malice may never be presumed. The burden of proving actual malice is upon the one alleging defamatory statements and it must be proven with convincing clarity.

Hirman v. Rogers, 257 N.W.2d at 566.

In *Valento v. Ulrich,* the appellants asserted that a letter gave rise to a false innuendo that the plaintiff was involved in dirty politics. The letter did not expressly state that either the plaintiff or his election committee were responsible for the alleged dirty politics. Under Minnesota law, the Court determines whether an alleged defamatory innuendo is reasonably conveyed by the language used. *See, Price v. Viking Press, Inc.,* 625 F. Supp. 641 (D. Minn. 1985). The Court stated:

> ... even if the court were to conclude that the letter falsely implies that appellants were responsible ..., such conclusion does not address the issue of actual malice. By arguing only that [the] letter contained a false innuendo that appellants played a part [in the dirty politics], appellants must rely on an inference of actual malice arising from such innuendo. As we have already noted, malice cannot be premused or inferred.

Valento v. Ulrich, 402 N.W.2d at 813.

The law in Minnesota is clear; malice cannot be presumed or inferred from statements. Malice must be proven with convincing clarity. Malice is the applicable standard to be utilized by the plaintiff in the instant case. As malice cannot be presumed or inferred from statements bearing innuendo, it is clear that there can be no defamation of a public official by innuendo.

VII.

ANALYSIS OF THE CONTENTS OF THE 44 ALLEGATIONS OF DEFAMATION

As noted earlier, plaintiff has alleged 44 separate allegedly defamatory counts within the amended complaint. Pursuant to this Court's order, plaintiff has expanded these 44 counts to a total of 197 specific statements of allegedly defamatory content. The Court has analyzed this material and arrived at the following conclusions.

The Court has considered four factual scenarios that have been analyzed for defamatory content. The four scenarios are: 1) that the plaintiff asked the Medical Examiner, Dr. McGee, not to change the designation on the death certificate from undetermined to homicide; 2) that plaintiff called Thomas Fabel of the Attorney General's office requesting the removal of Investigator Samuelson; 3) that the plaintiff blocked the issuance of a search warrant; and 4) that plaintiff was aware of an inherent conflict of interest involving himself and one of the suspects in the murder investigation shortly after the murder of Kathy Greening.

A) Starting in reverse order, the Court looks first to the questions of the alleged *conflict of interest*. Without delving into a lengthy recitation of the facts surrounding this alleged conflict of interest, let it suffice to be stated that there was a letter written shortly after the death of Kathy Greening alerting officials to the fact that one of the prime suspects was a campaign contributor to plaintiff's re-election campaign. Plaintiff asserts that this is capable of the inference that the plaintiff knew of this conflict of

interest, yet failed to act expeditiously and, indeed, failed to transfer the investigation to Anoka County earlier than in fact was done. Implicit in this is the inference that the plaintiff was personally aware of the letter, or that there was a potential conflict of interest. In point of fact, there is no showing that the plaintiff was personally aware of either the letter or the potential conflict of interest. On the other hand, the statements made are factually correct. The statements are not false. The investigating police agency did identify a prime suspect in the murder. This suspect was a monetary contributor to the reelection campaign of the plaintiff. Although it was not designated as such, it is clear that there was a conflict of interest. In point of fact, it was this conflict of interest that later prompted the plaintiff to transfer the investigation to the Anoka County Attorney.

Defendants have heatedly pursued the question of why it took three-and-one-half years to transfer the case. This is a legitimate concern of a news organization and, moreover, the public in general, whom plaintiff serves as the chief law enforcement official of Ramsey County. Given the legitimacy of the question, and the concomitant legitimate criticism of a public official as clearly phrased statements of opinion, coupled with the underlying truth of the factual scenario, the statements surrounding the conflict of interest are not actionable as a matter of law. The statements reported as facts are true, and the questioning commentary articulated by defendants is merely opinion.

In addition, this questioning commentary is clearly within the purview of the fair comment doctrine discussed supra.

B) The second factual scenario to be addressed is that of the reporting by the defendants that plaintiff blocked the issuance of a search warrant that was to look into the bank records of the prime suspect in the Greening murder case. The statement, "Foley blocked the search warrant," appears to be derogatory to the plaintiff. Plaintiff asserts that it is capable of a defamatory meaning. The defamatory meaning conveyed would be that, if not for plaintiff's conduct in opposition to the search warrant, the warrant

would have been issued. The meaning conveyed is that plaintiff was seeking to obstruct justice. If this were the meaning sought to be conveyed, or if indeed it was the meaning conveyed, then clearly it is capable of defamatory meaning. However, as noted throughout this memorandum, as well as throughout plaintiff's abundant pleadings and oral argument, the statement must be viewed in context.

Defendants did state, ". . . before Foley bowed out of the case his office blocked a search warrant aimed at the bank records of his campaign contributor." However, at a subsequent report, Defendant Eckert stated that the blocking of a search warrant meant that the Ramsey County authorities thought that their was insufficient probable cause to justify issuance, and in any event, the warrant could be obtained by going straight to the judge. This is a correct statement of the process involved in the issuance of a search warrant. Ergo, taken in context, it is clear that this statement is not false and not defamatory. As such, counts numbered J2, J1 (also is not of and concerning plaintiff), K1, K3, K10, K11 and M5 (also opinion) are dismissed for failure to state a claim upon which relief can be granted.

C) The next factual scenario to be addressed is the allegation that the plaintiff phoned Thomas Fabel of the Attorney General's office to have Investigator Samuelson removed from the investigation. Again, plaintiff would assert tha the inference to be drawn is that plaintiff was seeking to obstruct the investigation into the murder of Kathy Greening. The facts, as conceded by the parties, are that plaintiff did call Fabel. Samuelson did stop participating in the investigation. Officer Lunzer, of the Roseville Police Department, stated that he welcomed the assistance of Investigator Samuelson. In a Fabel interview carried by defendants, Fabel stated that his motivation in pulling Samuelson off of the investigation was that he did not want it to appear that the Ramsey County investigators were not doing an adequate job. Taken in context, it is clear that this is not defamatory of the plaintiff. At best, there

was some confusion as to which police agency was adequately pursuing the investigation. However, that would not bring the statements involving this fact situation into the arena of defamatory meaning. The series of events are quite innocent, and not defamatory.

Further, it would appear that the questions raised by the defendants about this series of events are editorial judgments related to legitimate criticism of public officials, and again, not actionable under Minnesota law. Therefore, counts numbered A1-12 (also opinion or hyperbole), D11, D12, D13 and D20 are dismissed for failure to state a claim upon which relief can be granted.

Before delving into the statements which the Court views as actionable in this litigation,it is important to address the number of statements that are either true or clearly opinion, and hence not actionable.

The Court will not burden the parties with a recitation of the alleged dafamatory verbage. Rather, the Court will cite the parties to the numbered counts with explanation as deemed appropriate.

D) It is the opinion of this Court that the following statements are true factual statements, and hence not actionable as defamatory. For purposes of illustration, let us examine one count. count C2 states en toto:

> "A police investigation indicated a suspect might be one of Foley's campaign contributors."

This is not opinion. This is not innuendo. This is simple truth. There was a police investigation. This investigation did turn up a suspect. This suspect was a contributor to Tom Foley's reelection campaign. It is not actionable as a matter of law.

The following counts are true, and therefore dismissed for failure to state a claim upon which relief can be granted:

B (also privileged fair comment), C@, D1, D2, (also fair comment), D14, D15, D16, D17, D18, D21, E1, F1, F4, G1, G2, G3, H1, H4, H5, H6, H7, K2, K7, K8, K9, L1, O3, Q2, Q4, Q5, R1 through R11 (also opinion), T2, T3, T8, T9, T10, T11, T12, T13.

E) The following counts are in the dominion of opinion.

As hereinbefore discussed, opinion is absolutely protected un the First Amendment to the Constitution. In addition, as discussed above, it is sometime difficult to discern whether a statement is fact or opinion. In recognizing this difficulty, the Eighth Circuit has supplied a 4-part test. Rather than take the numerous allegations that this Court has deem to be opinion and fit them into the aforementioned *Janklow* factors *ad infinitum*, the Court shall take one example to address the *Janklow* factors. Looking to Count D5 in which Defendant Eckert states:

> "She believes the authorities missed key evidence and failed to perform important tests which could have proved murder."

Mr. Eckert is clearly reporting the opinion of Ms. Carol Kellogg, a friend of the decedent, Kathy Greening. Ms. Kellogg did feel frustration at the seeming standstill of the murder investigation. However, her comments and feelings as to the stat of the investigation are no more than opinion. Ms. Kellogg's statements throughout the series of reports are predicated on this frustration. This frustration is minimally ventilated through expression of her opinions as to the investigation. They are fraught with imprecision and emotion, thereby more likely opinion.

Ms. Kellogg's statements rae not highly verifiable as fact, and hence opinion. In addition, the social context in which the statements are made is that Ms. Kellogg was extremely frustrated as to the state of the investigation into the death of her close friend. Ms. Kellogg had dire concerns over the lack of progress and seeming incompetence, and has strong opinions to express.

As to the statements' public context, Ms. Kellogg has gone to the authorities and to the media seeking any avenue of resolution to, what was to her mind, an unsolved murder case. The statements must be considered in this context. Defendants were simply reporting Ms. Kellogg's opinion.

In utilizing the above rationale, the Court concludes that the following statements are opinion, thereby not actionable defamation, and dismissed for failure to state a claim upon which relief can be granted:

D3, D4, D5, D6, D22, D23, D24, F2, F3, H2, H3, H8, I1, K4, K5, K6, k12, M1, M4, M5 (*see also*, search warrant discussion supra), N1, O4, O5, O6, O7, P1, P2, P5, P6, Q1, Q3, Q7, Q8, Q9, Q10, R1, R4, R5, R6, R8, R11 (also true), S1, T1, T4, T5, T6, T7, T18, T19, T20, Z4, Z18.

In addition, although the following statements related to the actionalbe defamatory statements, they are opinion, and therefore excluded:

Q6, R2, R3, R7, R9, R10, T2, T18, T13.

F) While the Court is of the opinion that the vast majority of the statements alleged by the plaintiff to be defamatory are, indeed, not defamatory, there are a number of statements that appear to be capable of defamatory meaning, and thereby remain for jury determination. *See, Utecht v. Shopko Dept. Store*, 324 N.W.2d 652 (Minn. 1982).

The factual setting of the statements that are capable of defamatory meaning involve the allegations that plaintiff telephoned the Medical Examiner, Dr. McGee, requesting that McGee not change the designation of cause of death from undetermined to homicide.

Count C1 states:

> "The Ramsey County Medical Examiner's office [Dr. McGee] officials say they were told not to change the death certificate from accident ot murder by Foley."

Here, quite clearly, the language indentified plaintiff. It may be false is the truth was that the officials asked that the designation remain undetermined pending further investigation. In addition, this Court is unaware of information that plaintiff was perscnally aware of the interaction with Dr. McGee. Although defendant observes that the designation of undetermined or homicide is not essential or of legal effect to a prosecution, nevertheless, these statements are capable of a defamatory meaning. The defamatory meaning is that plaintiff personally requested Dr. McGee not to change the designation of cause of death os that plaintiff would not have to prosecute a homicide where the suspect was a monetary contributor to plaintiff's reelection campaign. In effect, a listener could conclude that

the statement was — Foley was misusing the power of his office to obstruct a murder investigation. This is clearly capable of a defamatory meaning.

As it is this Court's role at this juncture to merely determine whether statements are capable of defamatory meaning, it is the Court's opinion that the following statements are worthy of resolution by the trier of fact:

C1, D7, D8, D9, D10, D19, H9, M2, M3, O1, O2, P3, P4, T14, T15, T16, T17.

G) Lastly, plaintiff has alleged in Counts U-Z3 and Z5-Z17 allegations of defamatory content as articulated by various media in the Twin Cities area. Plaintiff alleges that these publications are, in fact, republications of defamatory content.

It is the opinion of this Court that, as defendants astutely point out, for the most part these are not republications but rather are commentary by local media on a controversy in wich the plaintiff was clearly a participant. None of the numerous sources cited by plaintiff as republication are named as a defendant.

VIII.

CONCLUSION

The allegedly libelous statements in this litigation appear in a series of broadcasts that comment on important political events. It should be noted that the television programs under consideration involve various kinds of information and stimuli. It is not every communication, verbal or nonverbal, audio or visual, that is subject to the test or evaluation to determine if defamation occurred. Rather, the law requires a statement of fact. Otherwise, the Court would, in effect, impose on defendant an obligation to be prepared to substantiate the truth and accuracy of each and every opinion and comment; a task not only elusive but impossible. The net result would not only have a chilling effect on freedom of the press, but it would emasculate the media's effectiveness in its role to examine and comment on the very fabric of life in America, especially with respect to

the role of government and that of the so-called public servant.

The plaintiff in this litigation is a public servant; he is a public official. His views and acts must remain open to a wide range of commentary and criticism, protected from even the slightest degree of regulation. *Sharon v. Time, Inc.*, 575 F.Supp. 1162 at 1167 (1983). Given that plaintiff is a public official, he must prove that the allegedly defamatory statements were made with actual malice. Absent actual malice, it is properly thought that battles over what was true and not true could and should be waged in the media rather than in the courts, and that the public rather than a jury would render the final verdict. *Schiavone Const. Co. v. Time, Inc.*, 619 F.Supp. 684 (D.C.N.J. 1985).

As the Court in *Schiavone* notes:

> This action *may* result in a verdict favorable to the plaintiffs' but is may also, along with other defamation cases, result in a timorous and tentative press content to preport on births, weddings, deaths, and craft fairs. While it is essential to protect the individuals from a powerful media which can destroy reputations forever through abuse of that power, the greater danger lies in the destruction of the independence of the media itself.

Schiavone at 170.

This case cries out for an historical recitation of freedom of the press. From the rallying cry of freedom in Tom Paine's invigorating *Common Sense* to the nauseating bile of Larry Flynt's *Hustler*, this country has long held as its banner the nation of a free, unfettered and vital, open media.

While there is an obvious inherent tension between the press and those they seek to take to task, our country has a long history of support for public airing of controversy and criticism. It is, indeed, a cornerstone of our democracy.

As has been noted, this is a classic case of media criticism or investigation of a public official. Although public officials are not fair game for untruthful, malicious, derogatory attacks, they are appropriately subject to evaluation,

investigation and criticism. Accordingly, none of us in public office are removed or immune from media attention, which may be unfair and may sometimes offend our sensibilities. Although this type of broadcast is presented as "hard news," they have a custom of more colorful, even irascible language, than do traditional news media. High spirited presentation if increasingly the norm, especially in areas of controversy involving public officials. It is the crucible of public debate that will test the validity of this type of presentation; it is not the Court's province to intrude into the manner of presentation chosen by the free media. In a free society, that choice is appropriately, if not essentially, left to open, bold debate.

While plaintiff has taken umbrage at the manner and tone in which the broadcasts were presented, the law is such that courts are averse to intruding on matters of editorial judgment.

Not only are venial shortcomings such as pomposity and boastfulness subject to analysis, but investigation and evaluation of performance in office is warranted and a protected right.

As per the foregoing discussion, the counts enumerated in this memorandum are dismissed for failure to state a claim upon which relief can be granted. Conversely, those claims articulated under the banner of the fact situation involving the allegations of plaintiff requesting the Medical Examiner not to change the cause of death designation, as enumerated in this memorandum, are capable of defamatory meaning and therefore actionable.

Per this memorandum and order, the Court orders the parties to hold a rule 2.02 conference with respect to discovery in the remaining disputes.

LET THIS MEMORANDUM BE MADE PART OF THE FOREGOING ORDER.

R.G.S.

APPENDIX F

STATE OF MINNESOTA

COUNTY OF HENNEPIN
DISTRICT COURT
FOURTH JUDICIAL DISTRICT

TOM FOLEY,

Plaintiff,

vs.

WCCO T.V., Inc., a corporation,
STEVE ECKERT, and
JOHN LINDSAY,

Defendants.

ORDER FOR JUDGMENT
File No. 87-4560

Plaintiff's motion for reconsideration of the Court's order of January 20, 1989, was submitted to the Court upon written briefs.

Patrick J. Foley, Esq., represented plaintiff. Paul Hannah, Esq., represented defendants.

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED:

That plaintiff's motion for reconsideration is, in all respects, denied.

ORDER FOR JUDGMENT

IT IT HEREBY ORDERED:

That defendants have judgment on plaintiff's complaint, together with their costs and disbursements herein.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT

Dated:
April 5, 1989

Robert G. Schiefelbein

MEMORANDUM

This Court has reconsidered its January 20, 1989, order dismissing plaintiff's complaint and has reviewed the submissions of the parties. Not surprisingly, the parties have reiterated the same respective positions which they have maintained essentially since this case commenced.

This case is the classic confrontation between the reputation of an individual, his most prized possession, and freedom of the press, the free, frank and informed discussion by the public of issues, ideas and criticism, a right in scope peculiar to our nation.

Although this Court remains unconvinced of any inappropriate behavior of Mr. Foley, the law does not stifle criticism of public officials nor terminate investigative reporting merely on the basis of an individual opinion or denial of wrongdoing by the person who is the focus of the inquiry.

Accordinginly, the decision of this Court remains unchanged. The Court would, however, specifially invite any reviewing authority not to limit inquiry to appellate briefs but, as this Court has done, review each submission of the parties, including the many briefs, pleadings, depositions, affidavits and other documents in order to gain a full appreciation of the issues confronting this Court and the manner in which this litigation has progressed.

LET THIS MEMORANDUM BE MADE PART OF THE FOREGOING ORDER.

R.G.S.